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**A P P E A R A N C E S**

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**P R O C E E D I N G S**

(In open court at 3:18 p.m.)

THE DEPUTY CLERK: United States District Court is now in session, the Honorable Judge Indira Talwani presiding.

This is Case Number 19-cv-11457, AnywhereCommerce, Inc., et al., versus Ingenico, Inc., et al. Will counsel please identify themselves for the record.

MS. BOZEMAN: Thank you. Melissa Bozeman from Kutak Rock on behalf of the plaintiffs.

THE COURT: Good afternoon.

MS. BOZEMAN: Thank you.

MR. WRAY: Good afternoon. William Wray, attorney for defendants and counterclaimant Ingenico, Inc. Also on the call, although not speaking, are my colleagues Nicole Benjamin and John Tarantino.

THE COURT: Good afternoon.

So we are here on the motion to dismiss the second amended counterclaims. Specifically, Counterclaim 8, I believe. And so it's plaintiff's motion. I'll let you start.

MS. BOZEMAN: Thank you, Your Honor.

Plaintiffs have moved to dismiss Ingenico's patent infringement claim at Count 8 of its second amended counterclaims on two bases: The first is lack of standing, and the second is failure to state a claim.

1           The lack of standing defect is incurable, and it's  
2 readily apparent based on the record that's presently before  
3 the Court. This is something that can and should be decided  
4 by the Court today. It's an outrageous position, actually,  
5 to be asserting these patent infringement claims that don't  
6 belong to Ingenico and, in fact, belong to a nonparty and --  
7 as well as two belonging to BBPOS.

8           This represents a wrongful cloud on title to all  
9 nine of these patents in suit, and it isn't just a  
10 theoretical problem. It is an actual problem for at least  
11 the nonparty, 436 Canada. 436 Canada is actively suing  
12 Square, Inc., under six of the patents that are asserted in  
13 this case, and that case is pending in the Northern District  
14 of California, and the docket number is 19-cv-04311.

15           While those proceedings are stayed, IPR rulings are  
16 expected to be rendered relatively soon, and at that time,  
17 that district court case may resume. But it's a real  
18 problem, and it's -- and it's something that is just really  
19 outrageous to us. In analyzing standing in a patent  
20 infringement case, a recent order that was --

21           THE COURT: Ms. Bozeman, let's just start with what  
22 facts I do or don't have about the 436 patent and to -- so to  
23 break up what your arguments are. There is a license  
24 agreement between BBPOS and ROAM, and under that license  
25 agreement, there's a very broad clause giving the exclusive

1 license to things that BBPOS -- BBPOS's intellectual  
2 property.

3 And your assertion is that for seven of the nine,  
4 the intellectual property belongs to 436 Canada and not to  
5 BBPOS. And so my question here is, given their allegation  
6 that it belongs to BBPOS or that -- or that BBPOS has a  
7 sufficient interest in it, what's your response to that?

8 MS. BOZEMAN: Our response to that is that we -- we  
9 have actually added for the record the two licensing  
10 agreements that are in place between HomeATM, which is a  
11 predecessor of 436 Canada and predates the ROAM data license,  
12 and then there was another licensing agreement that was  
13 entered into in July of 2013 between 436 Canada.

14 These -- these licensing agreements --

15 THE COURT: Let me just stop you so I can follow  
16 along. The two license agreements that you just talked  
17 about, are those the same two that are attached to Ingenico's  
18 second amended counterclaim, the HomeATM BBPOS agreement and  
19 the 436 Canada BBPOS agreement, or a different --

20 MS. BOZEMAN: It's a different one. And the reason  
21 why we attached it is because there is actually language that  
22 appears in these licensing agreements that are referenced in  
23 the counterclaim, so it is an indispensable document that is  
24 relevant, directly relevant to their claims, and it's  
25 actually referenced by them in their pleadings.

1 THE COURT: Okay. Just so that I make sure I have  
2 it, because I'm working right now off a printed copy, do you  
3 have the docket number of the documents you're looking at or  
4 were these --

5 MS. BOZEMAN: I do. So the -- there's --

6 THE COURT: Go ahead.

7 MS. BOZEMAN: I'm sorry. My computer is breaking  
8 up a little bit.

9 THE COURT: Go on. I asked you the docket number,  
10 and you were about to give it to me.

11 MS. BOZEMAN: 79 is plaintiff's motion to dismiss,  
12 and the licensing agreement, the original one between BBPOS  
13 and HomeATM, is attached as Exhibit A; and then the second  
14 license, which postdates ROAM's license, is attached. Also,  
15 as Exhibit C, there is a printout from -- from the U.S.  
16 patent office which reflects the ownership of patents by  
17 436 Canada.

18 THE COURT: Got it. Okay. I just had it filed in  
19 the wrong place, but here I've got it. It is -- okay. So  
20 these are the documents that you have offered. These aren't  
21 ones -- I had them down as ones that were part of Ingenico's  
22 pleading, but here we go. Okay. So they're part of your  
23 pleading. And you're saying that based on these, the license  
24 that BBPOS received was nonexclusive?

25 MS. BOZEMAN: That's right. So the -- so the --

1 Exhibit A, it's dated March of 2010, and it's between HomeATM  
2 and BBPOS limited. HomeATM was a predecessor and -- to  
3 AnywhereCommerce and is an affiliated party with 436 Canada.

4 But the document that I attached as Exhibit A, it  
5 talks about what intellectual property rights were -- were  
6 licensed to BBPOS at the time and before the ROAM data  
7 licensing agreement. And so the intellectual property  
8 rights -- so if you go to Section 1.1 in that agreement, it  
9 talks about what the intellectual property rights at issue  
10 are.

11 And it talks about a "DTMF technology titled  
12 Apparatus and Method for Commercial Transactions Using a  
13 Communication Device." And then it also defines *products* as  
14 the communication device that uses that technology.

15 If you go to Section 2.1, it talks about the grant,  
16 the license grant, and it's a nonexclusive license to use  
17 those intellectual property rights in relation to the  
18 products.

19 Also, at Section 9.1, there is a prohibition  
20 against sublicensing. So there was no -- there was no basis  
21 for BP- -- BBPOS to be licensing any of these rights that may  
22 have arisen under this document, and, certainly, if it was a  
23 nonexclusive license that was being provided by the owner of  
24 this technology to BBPOS, BBPOS wouldn't then thereafter have  
25 an ability to grant an exclusive licensing --

1 THE COURT: All right. Okay. You're frozen.

2 MS. BOZEMAN: -- agreement.

3 THE COURT: I'm afraid your connection isn't very  
4 good, and you just froze there. We didn't get the end of  
5 your sentence.

6 MS. BOZEMAN: Apologies. What I was saying was  
7 that, of course, BBPOS would only be able to confer rights it  
8 actually had and not greater than what it -- was actually  
9 conferred in the first instance. So it could not then  
10 transform a nonexclusive license into an exclusive license.

11 THE COURT: Okay. So, Mr. Wray, let me have you  
12 respond just to that point right now. If the plaintiff has  
13 come forward with these documents and -- what's your  
14 response?

15 MR. WRAY: Thank you, Your Honor.

16 Our response is twofold. First, it's important to  
17 remember the 12(b)(6) standard here, and under that  
18 amended -- the amended counterclaims, Ingenico alleged that,  
19 as a factual matter, BBPOS had obtained the authority and the  
20 rights that were necessary to confer the license that it  
21 granted to ROAM.

22 THE COURT: So one is that you're relying on the  
23 fact that you don't have to have evidence; you can just make  
24 the allegation. And what's the second argument?

25 MR. WRAY: And the second argument is that if you



1 actually refer to the document that Ms. Bozeman was referring  
2 to, at page 11 in Section 9.2 thereof, this is a basis for  
3 another one of the allegations in the second amended  
4 counterclaims. Ingenico alleged that 436 had expressly  
5 acknowledged and consented to BBPOS's license to Ingenico.

6 THE COURT: Okay. I'm sorry. I wasn't able to  
7 follow you there. What section am I looking at?

8 MR. WRAY: Section 9.2, and at the bottom of the  
9 page, it should state page 11 of 15.

10 THE COURT: Okay. So which document are we looking  
11 at?

12 MR. WRAY: This is ECF Number 79-2.

13 THE COURT: Okay.

14 Okay. What does that get me?

15 MR. WRAY: So in this document, 436, which is the  
16 current assignee of the patents, is expressly acknowledging  
17 and consenting to BBPOS's agreement with Ingenico/ROAM. Now,  
18 that agreement specifically states that BBPOS is exclusively  
19 licensing these patents --

20 THE COURT: No. It doesn't refer to any patents,  
21 or it refers to one, but not these. It says BP- -- BBPOS  
22 is -- is exclusively licensing its, BBPOS's, intellectual  
23 property, but if BBPOS doesn't have the intellectual  
24 property, how can it license it? And the fact they say we  
25 know you have an agreement and we agree we're not going to

1 have anything to do with ROAM data, that's your customer,  
2 we're not going to deal with you, how does that mean we agree  
3 that our -- I mean, I'll tell you where the problem comes in  
4 for me, is that there's this whole concept of an exclusive --  
5 that a patent holder -- that somebody -- in order to enforce  
6 this, you know, let's imagine somebody right now wants to sue  
7 somebody who isn't one of you. Who is it that you were  
8 saying that 436 Canada is suing right now?

9 MS. BOZEMAN: Square, Inc.

10 MR. WRAY: Square.

11 THE COURT: Okay. So supposing one of you wanted  
12 to sue Square, Inc., who gets to sue them? And, Mr. Wray, by  
13 your analysis, only you can sue Square, Inc.

14 MR. WRAY: That may, indeed, be the case,  
15 Your Honor, and --

16 THE COURT: And so for you to get to that point,  
17 what you're saying is that, in this language by acknowledging  
18 and agreeing that it's not going to license anything to ROAM  
19 data, it's given up its own patent rights to do other things.

20 MR. WRAY: It's not that sentence of Section 9.2  
21 that I'm focusing on here.

22 THE COURT: Okay.

23 MR. WRAY: Rather, I'm focusing on 436's express  
24 acknowledgment and consent of the BBPOS/Ingenico agreement.  
25 Now --

1 THE COURT: Right, but the agreement doesn't say --  
2 the agreement doesn't say on it, "I give you -- I'm giving  
3 you 436 Canada's rights." The agreement says, "I'm giving  
4 you my rights."

5 MR. WRAY: The agreement, Your Honor, doesn't  
6 explicitly say, "We're giving you 436 Canada's rights," but  
7 the way that the BBPOS/Ingenico agreement reads is that it  
8 states that it's granting its rights over any and all patents  
9 and patent applications relating to products.

10 Now, the --

11 THE COURT: But it can't have rights -- it can't  
12 give away rights it doesn't have. You have -- you may well  
13 have a breach of contract claim, if it made promises. Or you  
14 may have a fraudulent misrepresentation claim or a  
15 detrimental reliance claim. I don't know.

16 But to have a patent claim, they have to have had  
17 the rights to give it away. It's like I sold you my house,  
18 but I didn't own my house. You can sue me for breach of  
19 contract, but if I didn't own the house, you can't get the  
20 house out of me. I didn't own it.

21 MR. WRAY: We concur that BBPOS could only give  
22 away that which it had, but we also allege that at the time  
23 this -- I'm sorry -- the BBPOS/Ingenico agreement, ROAM and  
24 BBPOS did have the rights to the 436 patents at that time.

25 THE COURT: Okay. So that's two different

1 arguments. One argument is they did have the rights, and the  
2 second argument is the ratification. And if this is what  
3 you're basing the ratification on, I don't think this gets  
4 you to ratifying -- giving away exclusive rights to a patent  
5 that -- with this language. I don't -- I don't think that  
6 gets you there.

7 So let's get to your question on the first thing,  
8 which is that you're saying that, at the time, separate from  
9 this ratification argument, that, in fact, BBPOS has all of  
10 the rights to these patents. And you're alleging that, and  
11 so for purposes here, you want me to deny the motion based on  
12 that allegation, despite the -- and to not consider the  
13 factual matter presented by Ms. Bozeman?

14 MR. WRAY: Your Honor, you can consider the factual  
15 matter presented by Ms. Bozeman. Defendants have no  
16 objection to the Court considering either of the two exhibits  
17 to the motion that plaintiff -- that plaintiffs filed to  
18 dismiss the case.

19 However, as is alleged and as was the case, when  
20 ROAM entered into this agreement with BBPOS in 2011, it  
21 wasn't in a vacuum. It knew about the relationship between  
22 BBPOS and AnywhereCommerce and the various forms of  
23 intellectual property that went into the BBPOS devices.

24 BBPOS just had devices that included technology  
25 that Ben Lo, who is the founder of BBPOS, had invented. And

1 all of these 436 patents, by the way, were actually patents  
2 that were invented by Ben Lo. Although 4361423 Canada is  
3 listed as the owner of the patent currently, they were also  
4 listed as Mr. Lo being the inventor of them. So at the  
5 time --

6 THE COURT: But the inventor -- if the patent has  
7 been assigned to someone, that's the person who would have  
8 the standing, not the inventor, right?

9 MR. WRAY: That's -- that's correct. I'm  
10 explaining the context by which Ingenico understood that, in  
11 2011, why BBPOS had the rights that it had in 436's patents.

12 THE COURT: But -- so to the extent that you're  
13 saying, "We thought they had it, and we had really good  
14 reasons for thinking it, and they led us to believe they had  
15 it" -- that's why I'm saying, you may have -- I don't know.  
16 You may have a fraudulent misrepresentation claim. You may  
17 have a breach of contract claim. You may have a lot of  
18 different claims.

19 But if they, in fact, didn't have it, their  
20 representations to you that they did have it or giving you  
21 the appearance that they did have it doesn't mean they did  
22 have it. So it's just sort of a factual question, did they  
23 or didn't they have those rights?

24 MR. WRAY: I concur, Your Honor, that that is a  
25 factual question and that we pled both a breach of contract

1 claim against BBPOS and --

2 THE COURT: And the breach of contract claim isn't  
3 subject to the motion to dismiss.

4 MR. WRAY: That's correct, Your Honor; however, we  
5 do --

6 THE COURT: Go on.

7 MR. WRAY: We do allege that, at the time this 2011  
8 license was made, BBPOS did have the requisite authority on  
9 behalf of AnywhereCommerce -- I'm sorry -- 436 to grant an  
10 exclusive license in those patents. And the existence in  
11 2011 of that authority is -- is shown circumstantially  
12 through the existence of this 2013 agreement to that  
13 exclusive license.

14 THE COURT: Okay.

15 MR. WRAY: I --

16 THE COURT: So if -- if that's the -- I mean,  
17 because I'm not sure that if I were to simply say this thing  
18 is decided on a motion to dismiss, because I can look at  
19 plaintiff's documents -- I'm not sure I would agree, even  
20 though you're willing to concede the point, that they're  
21 properly included without giving you a chance to make a  
22 response.

23 So if I were to convert it into a summary judgment  
24 motion, are you saying to me that your response to the  
25 summary judgment motion would be this ratification argument?

1 Because that's sort of circular. Then we're back to the  
2 ratification argument. My question is, what's the evidence  
3 that in -- that at the time of the agreement, that BBPOS, in  
4 fact, had the intellectual property to give away, had the  
5 exclusive right?

6 MR. WRAY: And, Your Honor, at this point, I'm not  
7 prepared to identify what all of the evidence supporting that  
8 allegation is. All I can say is that the 2010 license  
9 between 436 and -- I'm sorry -- HomeATM at the time and BBPOS  
10 and the 2013 license between 436 and BBPOS would be among the  
11 evidence listed. Notwithstanding the Court's presumption of  
12 them today, those would be among the evidence listed.

13 There's other evidence as well. For example, one  
14 of the other specific factual allegations that are in the  
15 second amended counterclaim is Mr. Lo's statement that these  
16 patents shouldn't be in the name of 436 because he invented  
17 them and there was a defect in the assignment or there was a  
18 lack of consideration.

19 So while I'm not prepared to list all the evidence,  
20 it is alleged that BBPOS had the authority to grant the  
21 exclusive license, and the 2013 license is just one of the  
22 specific pieces of evidence that supports that allegation.

23 And the last thing I would point out, Your Honor,  
24 is that this argument does not relate to the entire patent  
25 counterclaim.

1 THE COURT: It's --

2 MR. WRAY: It relates to only a subset.

3 THE COURT: I understand that.

4 So with regard to the subset, Ms. Bozeman, it does  
5 seem to me that the allegation, which is that BBPOS had the  
6 exclusive right, gets past the 12(b)(6) and that your  
7 documents suggest that you're going to prevail on the claim  
8 if that's the evidence, but not in this posture.

9 And so I guess the question is, would you like to  
10 convert your motion into a motion for summary judgment and  
11 have them respond, and then we'll have the record and resolve  
12 it on that?

13 MS. BOZEMAN: Well --

14 THE COURT: As to the seven patents. We'll address  
15 the other two, but --

16 MS. BOZEMAN: Okay. Well, Your Honor, I would  
17 suggest that the concession that this 2013 licensing  
18 agreement is evidence that should be considered by the Court,  
19 that this is evidence that directly contradicts their  
20 allegations.

21 If BBPOS had any rights to the intellectual  
22 property of 436 Canada, that would make this document  
23 meaningless, right? Why -- they would never need to have  
24 entered into this 2013 agreement had BBPOS had those rights.  
25 It's completely counterintuitive for them to have done so.



1 THE COURT: But once we are -- once we are opening  
2 this up to evidence -- and I appreciate that Mr. Wray is not  
3 disputing that this is an accurate -- you know, there's no  
4 dispute that this would be considered, and it's part of the  
5 picture. It does seem that I don't get to make a decision  
6 and say, well, I'm opening it up without giving them an  
7 opportunity. I mean, that's pretty straightforward rules  
8 under 12(b)(6), that if I do consider other evidence --

9 MS. BOZEMAN: Well, yes, Your Honor. We would like  
10 to convert this to a motion for summary judgment, then.

11 THE COURT: Okay. So let's address the remaining  
12 part of this and then see where we are and what makes sense  
13 to do.

14 So the second argument, which still needs to be  
15 addressed either way, because that goes to the remaining  
16 two -- even if you could successfully knock out these seven,  
17 Ms. Bozeman, you still have the other two patents.

18 MS. BOZEMAN: Well -- right. But we also have our  
19 arguments related to that, which is based on these documents,  
20 where we do think that these are properly subject to --

21 THE COURT: We just lost you. We just --

22 MS. BOZEMAN: -- are not --

23 THE COURT: Ms. Bozeman, we lost you. You said,  
24 "We do think these are properly," and then we didn't get you  
25 after that.

1 MS. BOZEMAN: So we do also have arguments relative  
2 to all of the patents collectively that are based in these  
3 documents as well and, also, the plaintiff's own concessions  
4 in its -- in its pleadings where they have conceded the fact  
5 that there was a purchase of ROAM/Ingenico -- there was a  
6 purchase of ROAM by Ingenico, which under the ROAM/BBPOS  
7 licensing agreement directly prohibit any sort of  
8 assignability or transferability of any license in that  
9 event. That occurred in 2015.

10 THE COURT: So here's the part I don't understand  
11 about that argument.

12 MS. BOZEMAN: Uh-huh.

13 THE COURT: The -- you're dealing with ROAM. Your  
14 client is dealing with ROAM in this -- under this contract.  
15 And this is a contract that's -- continues in place until  
16 when? When did this -- when did this --

17 MS. BOZEMAN: The licensing agreement?

18 THE COURT: Yeah. Yes.

19 MS. BOZEMAN: I'm sorry. It's breaking up a little  
20 bit. But the licensing agreement was perpetual. So there  
21 was -- there were sublicensing rights. Those rights, though,  
22 this exclusivity aspect of it, if you look at this document,  
23 it is not -- it's not an exclusive right to IP. It's an  
24 exclusive product license, and I think it's an important  
25 distinction, because POS was the right -- a license to freely

1 use and sell these products.

2 THE COURT: Okay. So let me ask this question:  
3 How long did you continue selling these products or having  
4 Ingenico paying BBPOS money?

5 MS. BOZEMAN: Right. Well, and that's an important  
6 part to kind of point out to the Court's attention, too, that  
7 this product -- there's two products that are actually --  
8 they're -- it's a defined term in this licensing agreement  
9 with BBPOS. One of them is called the CircleSwipe. The  
10 other one is called the ROAM -- the ROAM POS. It was, like,  
11 an EMV reader, POS product.

12 That product was to be designed and manufactured  
13 and developed under this -- under this agreement. It never  
14 was. So there's one -- one product at issue. It's called  
15 the CircleSwipe, and that had been sold by BBPOS to ROAM, I  
16 think -- I'm not sure if they still are selling it, but at  
17 least during the usefulness of this one particular product.

18 THE COURT: So I guess what I'm trying to figure  
19 out, opposing counsel refers to this as the BBPOS/Ingenico  
20 agreement. Has Ingenico been paying BBPOS any money under  
21 this agreement?

22 MS. BOZEMAN: In connection with the purchase of  
23 these products.

24 THE COURT: Yeah.

25 MS. BOZEMAN: Yes. Yes.

1           THE COURT: So -- so you have an agreement which  
2 has a clause that says, "If you're purchased, we get right of  
3 first refusal, which will not be unreasonably withheld." And  
4 you're saying the transactions that happened amounted to  
5 being sold, and they didn't ask permission. But I guess I'm  
6 saying, and then after that, it appears that you continued to  
7 function under this agreement, no?

8           MS. BOZEMAN: Yes, Your Honor. So the -- I would  
9 have two responses to that, the first being that a license  
10 here is distinguishable between the act of selling a product,  
11 right? So there was consideration that was supporting the  
12 sale of these products.

13           The licensing issue is a prohibition on the  
14 transferability of that license to Ingenico.

15           THE COURT: I'm just trying to -- I'm backing up a  
16 little bit from your arguments and maybe from Mr. Wray's, and  
17 maybe I'm coming out of left field here. But what you're  
18 saying is there was this opportunity to end this  
19 relationship, right? The contract says it remains in force,  
20 except if there's a sale, we get to weigh in, right? That's  
21 what you're saying. And then it appears there's a sale, and  
22 you don't weigh in.

23           MS. BOZEMAN: Well, they -- yes. They were  
24 allowed -- uh-huh.

25           THE COURT: So why --

1 MS. BOZEMAN: Well, there's also antiwaiver  
2 language in here, which would be --

3 THE COURT: Okay. There is antiwaiver?

4 MS. BOZEMAN: Yes, there is, but -- I can -- I  
5 think it's Section 11, Your Honor. 11.1.

6 THE COURT: Okay. Okay. So -- so let me then make  
7 sure I understand what I have in the pleadings for when  
8 transaction happened, which is that ROAM -- their  
9 shareholders -- you have allegations about different  
10 shareholders and how much Ingenico did or didn't own; but in  
11 addition to that, there is a point when ROAM no longer is an  
12 entity and there's a merger?

13 MS. BOZEMAN: Right. So there's two different  
14 issues. There's the 100 percent sale of all the stock in  
15 ROAM to Ingenico, and that was effectuated in 2015. And then  
16 there was -- at the end of the year of 2017, there was a  
17 merger. And so the -- the cutoff point here is when there  
18 was that sale of the 100 percent of the interests in ROAM, at  
19 least, we say.

20 THE COURT: Okay. So, Mr. Wray, on that point,  
21 putting aside for a minute the 70 percent ownership or  
22 100 percent ownership, I -- I do tend to think about  
23 corporations as having -- sort of being discrete entities  
24 even if they're wholly owned. So it does appear I had a  
25 discrete entity that was ROAM, and then at some point, ROAM

1 has a merger regardless of how much is owned or not owned.  
2 At some point, it no longer exists because it has been merged  
3 into another company.

4 And do I understand, Mr. Wray, that your argument  
5 here is simply that merger is different than sale, or is  
6 there some different argument that I'm missing?

7 MR. WRAY: There are a number of arguments, Judge.  
8 That is one of them. The first point that I would make is  
9 that all of this goes, if anything, only to the question of  
10 how long Ingenico would be able to recover damages for patent  
11 infringement, because the statute of limitations for patent  
12 infringement is six years. This counterclaim was filed in --  
13 I don't recall if it was 2019 or 2018; but in any event, for  
14 at least part of that six-year period, it's undisputed that  
15 ROAM had not been sold to a competitor with its own POS  
16 products.

17 So while Ms. Bozeman may bring this up as an issue  
18 that has to do with how long Ingenico should be able to  
19 recover damages for, it certainly isn't an argument that  
20 should result in the dismissal of the entire count.

21 Secondly, Your Honor, as you pointed out, there are  
22 a number of issues, factual issues, relating to the parties'  
23 continued performance under this contract that simply aren't  
24 appropriate to raise in a 12(b)(6) motion when that hasn't  
25 been the subject of allegations by either side. There has

1     been continued performance under this with payment coming  
2     from Ingenico to BBPOS after this license purportedly ended.

3             That is one of many facts that would show that even  
4     if there was, under the meaning of the agreement, a sale of  
5     the company to a competitor with its own POS products, an  
6     indication that the license did not, in fact, come to an end.  
7     The license doesn't state it automatically terminates. It  
8     says that there can't be such an assignment without prior  
9     written consent of BBPOS, not to be unreasonably withheld.

10            So there is additionally a fact issue as to whether  
11    BBPOS gave written consent to Ingenico, or if it withheld it,  
12    whether it did so unreasonably. All of those are issues that  
13    are not properly raised by the pleadings, and at this stage,  
14    the Court should accept Ingenico's allegation that it does  
15    continually enjoy the rights under that agreement.

16            THE COURT: Well, I can't take your allegations  
17    over the contract language. I take your point. It's a fair  
18    point that I can -- if something goes beyond the contract  
19    language here, I shouldn't be doing that on a 12(b)(6). But  
20    the fact that you're saying it goes on -- you've alleged that  
21    it goes on forever doesn't mean it does if the contract says  
22    it doesn't.

23            MR. WRAY: Well, the contract does not say it would  
24    terminate. It doesn't state that the license -- in the event  
25    of a sale of the company to a competitor, the license

1 terminates. It states that it cannot be transferred or  
2 assigned without BBPOS's consent, not to be unreasonably  
3 withheld. Now, whether --

4 THE COURT: Would that mean, then, that the --  
5 right now, the reason that there is not a lawsuit being  
6 brought by ROAM, but instead there is a lawsuit being brought  
7 by Ingenico, don't you have to establish that Ingenico is the  
8 party to whom this contract runs? I mean, you've called it  
9 the "Ingenico contract," but I've got -- don't I have to  
10 figure out whether, in fact, you can sue on this contract?

11 MR. WRAY: Yes, Your Honor. And we've alleged that  
12 Ingenico, Inc., did receive the rights under the BBPOS/ROAM  
13 contract, which I now call the Ingenico/BBPOS contract. The  
14 license -- the entire agreement states that it's actually  
15 freely transferable and assignable except for these  
16 circumstances.

17 THE COURT: Okay. And so they're saying these  
18 circumstances apply here. And why -- why isn't that  
19 something that I should resolve off the contract language?  
20 Maybe they're right, maybe they're wrong about how they're  
21 reading the contract language, but how can you just allege  
22 something different than the contract language?

23 MR. WRAY: Because matters that occurred after the  
24 signing of the contract are relevant to determining whether  
25 events that are listed in there occurred. For example, we --



1 we cited law stating that purchase of 100 percent of the  
2 ownership interests in a company does not actually consummate  
3 a sale and --

4 THE COURT: But that part -- I haven't gotten  
5 there. That's the 70 to 100 percent. I'm at the merger  
6 moment. You're not arguing that the merger doesn't  
7 constitute a sale, does it, or are you also?

8 Because to me, the way I'm thinking about it -- and  
9 I haven't gone and read the case that either of you cited yet  
10 on this point, but the way I think about it is that there is  
11 something to a corporate form. And so I tend to agree with  
12 you, Mr. Wray, that whoever owns it isn't meaning that --  
13 that doesn't mean that the corporation has been sold. That's  
14 just the stock in the corporation has been sold.

15 But if the corporation is now no longer in  
16 existence, that seems to me it's -- this is a different  
17 transaction here.

18 MR. WRAY: It is a different transaction. It's not  
19 one that is -- necessarily appropriately described by the  
20 term "sale." The parties are free to add the term "merger"  
21 into the contract, but they didn't here. It states it's not  
22 transferable or assignable in the event of a sale of the  
23 company to a competitor. The parties chose not to include  
24 the word "merger" in there. It's not clear why they did  
25 that, but a merger doesn't fall within the restriction on

1 transferability or assignability here.

2 And further, Your Honor, there's significant  
3 factual questions about whether the terms of this provision  
4 were fulfilled. For example, it doesn't just state that  
5 there has to be a sale. It has to be a sale to a competitor  
6 with its own POS products. Those are point-of-sale products.

7 Now, there's no doubt that today Ingenico, Inc.,  
8 has mobile point-of-sale products, but we're discussing a  
9 different entity, which was Ingenico Ventures SAS, which took  
10 the ownership interest in the -- in the license agreement.

11 THE COURT: When did that -- I'm -- just so I'm  
12 clear, the -- are you talking about when they became the  
13 shareholders or when the merger happened?

14 MR. WRAY: I am talking about the -- when they  
15 became the shareholders. And it is correct that -- I don't  
16 know, Your Honor. It's not alleged that at the time that  
17 Ingenico, Inc., purchased or, rather, merged with ROAM that  
18 they had POS products at the time. My understanding -- and  
19 this is outside the pleadings -- is that the company that had  
20 mobile point-of-sale products was Ingenico Ventures, and that  
21 Ingenico, Inc., sold terminal products which are -- which are  
22 different from these.

23 THE COURT: Okay.

24 MR. WRAY: So in addition to the other issues we've  
25 raised, including, most importantly, the statute of

1 limitations and the fact that at least for part of the  
2 statute of limitations there was no alleged sale and the  
3 license was in place, there's no demonstration that there  
4 would have been an automatic termination of the license.

5 THE COURT: Okay. So, Ms. Bozeman, would you agree  
6 that at least as to the period before the change in  
7 ownership, however you want to define it, but the period  
8 before that, that can't be addressed on this argument of your  
9 motion?

10 MS. BOZEMAN: Well, I think it can, Your Honor,  
11 because we cited to a case that talked about how a transfer  
12 of a license agreement would be a material breach of the  
13 contract, so I think that that would be a sufficient basis  
14 for the Court to hold that this license is no longer  
15 enforceable by them.

16 The -- if we think about what's enforceable in a  
17 patent infringement case, it's the right to exclude. And if  
18 there has been a material breach here, the right to exclude,  
19 I think, shouldn't be extinguished.

20 THE COURT: So you would say -- let's assume you  
21 have -- an exclusive license goes to somebody, and at some  
22 point, that relationship ends. There's a breach. The  
23 contract's over.

24 MS. BOZEMAN: Uh-huh.

25 THE COURT: During the period of the exclusive

1 license, a third party was infringing on the patent.

2 MS. BOZEMAN: Uh-huh.

3 THE COURT: Who would be able to sue? During that  
4 period, who could sue against the third party?

5 MS. BOZEMAN: Well, so no one would, because if you  
6 look at -- so the one case that -- there was this recent  
7 order that came out in the Northern District of California,  
8 December 4, 2020, and it's this -- it's this really  
9 interesting discussion about how standing works. And so one  
10 aspect of this order, which is called Uniloc USA, Inc., v.  
11 Apple, Inc., one aspect of this order talks about this  
12 distinction between statutory standing and constitutional  
13 standing.

14 And so when you have -- when we're talking about  
15 statutory standing, that means you need to be a patentee,  
16 right, and that you need to have some sort of -- you need to  
17 have all or substantially all of the interests in the patent,  
18 right, just to qualify to bring such a claim.

19 But the -- what this court focuses on is the  
20 constitutional aspect of it, the Article III standing, which  
21 is really grounded in whether or not a plaintiff has -- it's  
22 something that needs to be --

23 THE COURT: We just -- we lost you from "it's  
24 grounded on whether or not a plaintiff."

25 MS. BOZEMAN: Has exclusionary rights.

1 THE COURT: Okay. But --

2 MS. BOZEMAN: So those exclusionary rights can  
3 change over time based on the licensing.

4 THE COURT: But you're saying that if a contract  
5 terminates, you're therefore not getting the benefits of the  
6 contract before termination either? It doesn't -- that  
7 doesn't really make sense. And when you --

8 MS. BOZEMAN: I --

9 THE COURT: I was posing it against a third party  
10 to sort of show -- I mean, in the scenario I was saying -- so  
11 the person who had had the exclusive license -- which they no  
12 longer have, but they had it for this time period -- they  
13 want to bring a claim against a third party, and the third  
14 party gets to assert as a defense, "Oh, you were in a breach  
15 of -- with the patent holder; and, therefore, no one can  
16 bring a claim against me. I have a right to it"?

17 MS. BOZEMAN: Yes. That is exactly what this  
18 order -- that's exactly what this order says.

19 The -- and I can give the Westlaw cite. It's  
20 2020 WL 7122617. And this just was issued December 4, 2020.  
21 But it talks about --

22 THE COURT: Is -- who is the judge?

23 MS. BOZEMAN: The judge is --

24 MR. WRAY: William Alsup, Your Honor.

25 MS. BOZEMAN: Alsup.

1 THE COURT: Thank you.

2 MS. BOZEMAN: And so this talks about how you  
3 can -- as a defendant, you are challenging the right -- the  
4 standing of someone to bring a patent infringement case.

5 And I agree with Your Honor, there could be other  
6 kinds of claims that are brought as a result of a contractual  
7 or a tortious claim, but to have standing to bring a patent  
8 infringement case, you need to be -- you need to be  
9 statutorily qualified as well as to have this exclusionary  
10 right. If this exclusionary right is gone, you don't have  
11 that right to exclude. You can't bring that claim.

12 THE COURT: And you're saying that once the  
13 contract is over, for all period under contractual, anyone  
14 can do what they want? I mean, once the contract is over,  
15 the period of time where there was a license agreement, the  
16 world is free to infringe on the patent?

17 MS. BOZEMAN: When -- when a license -- I'm sorry.  
18 Could you repeat that question?

19 THE COURT: What I think you're saying to me --  
20 let's say you have a five-year period of time where a  
21 patent -- there's a license to another party. And that party  
22 had that license for that five-year period of time, exclusive  
23 license. At the end of that five years, that contract is not  
24 renewed, but the infringement that happened, happened during  
25 the period of the contract. And so you're saying, at that

1 point, it reverts to the patent holder or it gets to no one  
2 to --

3 MS. BOZEMAN: It goes to no one.

4 THE COURT: I will read Judge Alsup's decision.

5 Okay. We're getting close to the end of our time  
6 here. I think where I am on the first argument, which is the  
7 argument that the seven were held by 436 Canada, I'm going to  
8 allow you to convert your motion into a summary judgment  
9 motion if you want to. It may be simpler if you refile it so  
10 it's limited -- it's addressing that issue. And then  
11 Mr. Wray will have a chance to respond with an evidentiary  
12 response to that.

13 With regard to this question of whether the  
14 pleadings are sufficient to allege that, at least for some  
15 part of the time, there was a -- they had the exclusive  
16 license, I'm -- was swayed by Mr. Wray's argument, but I will  
17 go back and read this case that you've cited and see where I  
18 come out after I read that.

19 And then you had a third argument, which just has  
20 to do with the specificity of the allegations, I believe,  
21 their 12(b)(6) argument. And I guess they've responded that  
22 they've put you on notice that they're claiming that you're  
23 infringing these patents and --

24 MS. BOZEMAN: Right.

25 THE COURT: -- what more do you need.

1 MS. BOZEMAN: Right. And if I could just add one  
2 more argument as to the seven patents. This is just the  
3 legal argument. With respect to the standing issue, if you  
4 go to the statutory standing aspect of it, you have --  
5 there's three different situations, really, where someone  
6 might want to assert a patent infringement claim.

7 One is where they have all -- all -- substantially  
8 all of the rights in the patent. And we all agree, I  
9 think -- I don't think Mr. Wray would disagree that that's  
10 not the situation that Ingenico was asserting its claims  
11 here.

12 The second situation would be when there is -- when  
13 you have a right to exclude, you -- but what you have to do  
14 is also name -- you also have to join the patentee, the owner  
15 of that patent. And with respect to the 7436 Canada patents,  
16 the failure to join 436 Canada is a -- is an absolute defect.

17 THE COURT: What about their argument that that  
18 rule doesn't apply if the person you're suing is the patent  
19 holder?

20 MS. BOZEMAN: They're not suing 436 Canada.  
21 They're suing AnywhereCommerce, and they're separate  
22 companies.

23 THE COURT: Okay. Mr. Wray, what's your answer to  
24 that? And they're suing BBPOS, which is a separate company.

25 MR. WRAY: Your Honor, we have a number of



1 responses to that. First, in our response, we have alleged  
2 that we are an exclusive licensee with all substantial rights  
3 in the asserted patents. There's a list of all the  
4 substantial rights that constitute that under the law, and if  
5 you compare that to the BBPOS license, Ingenico/ROAM were  
6 granted all of those rights, including the exclusive right to  
7 bring claims for infringement.

8 Secondly --

9 THE COURT: I don't think there was an exclusive  
10 right to bring claims for infringement, was it, or was I  
11 reading an earlier version? I thought it was a right to  
12 bring claims for infringement, but not an exclusive right.  
13 Am I misreading?

14 MR. WRAY: Allow me to pull up that specific  
15 language.

16 It says that in the event -- and I'm reading  
17 from -- this is ECF Document 78-1. This is the  
18 Ingenico/BBPOS agreement, and we're at what the system  
19 describes and what the exhibit describes as page 13 of 16.  
20 And this paragraph states that Ingenico/ROAM shall have the  
21 first right, but the not the obligation, to institute,  
22 prosecute, and control legal proceedings to prevent or  
23 restrain such infringement. I paraphrased a little bit,  
24 Your Honor, but --

25 THE COURT: So -- but first right, but not the

1 obligation doesn't mean exclusive right.

2 MR. WRAY: It means that BBPOS could not institute  
3 claims for infringement without first allowing Ingenico to do  
4 so.

5 THE COURT: Right. But it doesn't mean that only  
6 Ingenico can bring it. I mean, the problem with -- the  
7 reason that you have to bring the patent holder in, in these  
8 things, is that you don't want third parties to get sued from  
9 a bunch of different people.

10 MR. WRAY: Correct.

11 THE COURT: So why isn't she right that, to the  
12 extent you're suing on 436 Canada's patents, you can't sue  
13 these parties without 436 Canada's joining in?

14 MR. WRAY: She's incorrect for two reasons,  
15 Your Honor. The first is that Ingenico does enjoy  
16 substantially all of the rights in the patent as that phrase  
17 is used in precedent. And the second reason is that the  
18 exception that we discussed in the context of the *Duckweed*  
19 case, *Duckweed USA v. Behrens*, does apply here.

20 THE COURT: Why?

21 MR. WRAY: This exception -- it extends from an  
22 original Supreme Court decision from 1891 in equity where it  
23 decided that the title remains in the owner of the patent and  
24 suit must be brought in his name and never in the name of the  
25 licensee alone unless that is necessary to prevent an

1 absolute failure of justice, as where the patentee is the  
2 infringer and cannot sue himself.

3 THE COURT: But her point is the patentee can't sue  
4 themselves because that -- that was my -- I read your thing.  
5 You convinced me, but she pointed out, you're not suing  
6 436 Canada.

7 MR. WRAY: 436 Canada is the parent company of  
8 AnywhereCommerce here, and while I agree with you,  
9 Your Honor, that that's not literally the same person, this  
10 is an equitable exception. This isn't a rigidly legalistic  
11 exception.

12 THE COURT: Okay. Put aside for a minute  
13 AnywhereCommerce. You're asserting BBPOS as well.

14 MR. WRAY: That's correct. And there's no question  
15 that 436 could sue BBPOS because they have a license from  
16 436.

17 THE COURT: Oh, that -- the question here -- you're  
18 suing BBPOS, and you're saying you don't need to include  
19 436 Canada because what?

20 MR. WRAY: There are several reasons, Your Honor.  
21 First, BBPOS as alleged in its own pleading, is in a tight  
22 partnership with AnywhereCommerce, and I can pull up the  
23 exact language of that. They refer to a very close  
24 partnership where they've locked up together. Now --

25 THE COURT: I -- I have a -- you know, I have to

1 say, it's such a funny thing when you're dealing with  
2 corporations. Everybody wants a corporate form when it's  
3 helpful, and everyone wants to pretend the corporate form  
4 isn't there when it's not helpful. I have a separate -- I  
5 don't care that they're good partners and they love each  
6 other today. Tomorrow they come in and they're fighting with  
7 each other. They're separate corporate entities.

8 MR. WRAY: Your Honor, we would also point out that  
9 this is an equitable exception. It's designed to address the  
10 kind of observed situation where we would have here, if we  
11 attempted to bring in somebody that Ms. Bozeman represents,  
12 her firm has accepted service of a subpoena to 436 Canada,  
13 and have that person be suing the other person that she's  
14 representing, now, I agree, Your Honor --

15 THE COURT: Well, that's not -- that's not the  
16 determination of which their counsel is. The question is --  
17 well, I guess I should say this: Do you have authority for  
18 the idea that this exception, which has been there for a long  
19 time, is used where they are different corporate entities,  
20 not the same corporate entity?

21 MR. WRAY: We have not found a case where -- or we  
22 did not identify yet a case where it wasn't the same  
23 identical corporate entity and would suggest that, under both  
24 *Waterman* and *Duckweed*, the reason that this rule exists is to  
25 prevent, they say, a failure of justice as where the patentee

1 is the infringer, and that's giving an example of why it says  
2 "to prevent an absolute failure of justice, as where the  
3 patentee is the infringer."

4 Now, here, we're just outside of that literal  
5 example that they've given, where it would be effectively the  
6 patentee as the infringer. Yes, separate corporate forms,  
7 but in particular circumstances here, it would -- it would be  
8 an absurdity for 436 to sue BBPOS.

9 One of the reasons it would be an absurdity for 436  
10 to be the plaintiff suing BBPOS, apart from counsel, is the  
11 fact that there is this license in existence which expressly  
12 licenses those patents to BBPOS. There's not -- there's no  
13 concern here, Your Honor, that --

14 THE COURT: Well, but -- I mean, if your version of  
15 this is correct, then BBPOS takes a license and -- the --  
16 BBPOS goes and takes -- represents that there's an exclusive  
17 license that can be given -- in 436 Canada that can be given  
18 to your client.

19 So it would seem if they did that -- I mean, maybe  
20 it's not a patent claim, but it would seem like 436 Canada  
21 could sue BBPOS for interfering -- for trying to sell their  
22 patent rights that they didn't have.

23 MR. WRAY: I'm not aware -- not where 436 has  
24 expressly acknowledged and consented to that license in  
25 question.

1 THE COURT: Well, this is a question of how we're  
2 interpreting that.

3 MS. BOZEMAN: The whole thing exposes the  
4 absurdity.

5 THE COURT: You just -- I don't know if you froze  
6 or you stopped. You said that this whole thing exposes the  
7 absurd, and that's all we got.

8 MS. BOZEMAN: The absurdity of their position to  
9 begin with, because it exposes the fact that they have no  
10 rights in these patents, and that's why they're reluctant to  
11 bring 436 Canada in, because 436 Canada has licensed both of  
12 the -- all of their patents to these two entities that  
13 they're suing. So it doesn't make any sense.

14 THE COURT: Well, but that's their point. They're  
15 saying you've licensed them to those things, so 436 Canada  
16 isn't going to sue them and that they have now taken those  
17 patents and licensed them to Ingenico, so Ingenico can  
18 complain if they're not getting the benefit of that license,  
19 is the argument. I mean --

20 MS. BOZEMAN: But that could happen in any  
21 situation. They are still separate entities. 436 Canada is  
22 still the patentee, and the letter of the law is -- is  
23 settled on this, that they need to be joined. They need to  
24 be joined, then.

25 MR. WRAY: Respectfully, the letter of the law

1 isn't settled. There's an exception for when the current  
2 assignee of the patent needs to be joined. That exception  
3 concerns when it would be an absolute failure of justice to  
4 attempt to bring in a third of Ms. Bozeman's clients to sue  
5 the other two of her clients. And I understand the Court's  
6 point that, presumably, they would get separate counsel at  
7 that point.

8 But my point is that the interests of BBPOS,  
9 AnywhereCommerce, and 436, both under the law and as they've  
10 alleged it, are the same here. And it would be joining  
11 almost a defendant itself to join 4361423 Canada. And as to  
12 the -- the situation itself, Your Honor, the broader context  
13 of this is that when Ingenico was dealing with BBPOS back in  
14 2011 -- and at the time it was ROAM -- it was entering into  
15 an agreement about the production of mobile point-of-sale  
16 devices. It knew at the time that when it was dealing with  
17 BBPOS, there was a number of different sources of  
18 intellectual property that underlay those devices.

19 Some of it belonged to HomeATM or 436, and some of  
20 it belonged to BBPOS and negotiated this agreement whereby,  
21 in exchange for paying for these devices, which was done  
22 continuously up through 2019 and perhaps at present, it would  
23 have an exclusive right to all this intellectual property.

24 And AnywhereCommerce knew that, 4361423 Canada knew  
25 that, BBPOS knew that, and all were -- blessed the deal in

1 writing, giving Ingenico all of the substantial rights and  
2 all of the patents related to this. Only afterwards,  
3 apparently, when BBPOS became disappointed in the broader  
4 relationship, did they decide to go off on their own and  
5 become their own manufacturer.

6 THE COURT: Okay. So I will think about these  
7 other arguments on this specific issue about the seven  
8 patents and who holds them in light of your concerns about --  
9 this is a cloud on the title, et cetera.

10 MS. BOZEMAN: Right.

11 THE COURT: I would suggest that -- go ahead and do  
12 your briefing on that separate from the rest of these  
13 arguments. I know some of these arguments could make that  
14 unnecessary if you were to prevail, but I think let's keep it  
15 separate for now.

16 MS. BOZEMAN: As to just the seven, Your Honor?

17 THE COURT: As to the specific question about the  
18 seven, which is the issue that -- whether BBPOS had the  
19 license -- had the exclusive license so that it could then  
20 pass it on and/or the ratification -- those two parts of the  
21 question on the seven.

22 MS. BOZEMAN: Okay. Yes. Thank you, Your Honor.

23 THE COURT: Mr. Wray, anything else?

24 MR. WRAY: My only question, Your Honor, is whether  
25 the Court would like the defendant and counterclaimant to



1 respond to the citation to *Uniloc v. Apple*, a case that I  
2 wasn't aware plaintiffs would rely on until the hearing  
3 today.

4 THE COURT: If you want to submit something really  
5 short, like two pages kind of short, I'll go read it, and I  
6 may or may not -- I may think it's relevant or not relevant.  
7 I don't know. I haven't read it. And I don't know whether  
8 you have it in your mind either, but I'll give you something  
9 very brief.

10 MR. WRAY: Thank you, Your Honor.

11 MS. BOZEMAN: And, Your Honor, as far as timing for  
12 the motion, is there a constraint on that with the holidays  
13 or -- we, obviously, want it done as expeditiously as  
14 possible, but --

15 THE COURT: It's the holidays. It's the holidays.  
16 I'm not expecting you to get this done over the holidays.

17 MS. BOZEMAN: Okay.

18 THE COURT: But I recognize that you want to get  
19 something done, and --

20 MS. BOZEMAN: We do.

21 THE COURT: -- so I guess I would encourage you to  
22 get it in when you can in January, and then they'll have  
23 their three weeks to respond. It's summary judgment.

24 MS. BOZEMAN: Right.

25 THE COURT: And I would -- even though I am

1 designating it summary judgment, I'm not asking you to brief  
2 anything larger than this question that you're, essentially,  
3 saying I should decide it on these contracts. And you may  
4 want to just rest on these contracts. They may be something  
5 more; they may be something else. But Mr. Wray is suggesting  
6 that he's -- has other arguments and other evidence, and  
7 he'll certainly be allowed to -- to offer that in response.

8 I don't typically allow a reply as a matter of  
9 course, but under our local rules on a summary judgment, you  
10 do get a reply.

11 MS. BOZEMAN: Okay.

12 THE COURT: So that's due two weeks after the  
13 opposition. Okay?

14 Thank you very much. Have a good holidays,  
15 everyone.

16 MS. BOZEMAN: You too.

17 MR. WRAY: Thank you, Your Honor.

18 MS. BOZEMAN: Thank you, Your Honor.

19 THE DEPUTY CLERK: Thank you, Your Honor.

20 The Court is in recess.

21 (Court in recess at 4:21 p.m.)  
22  
23  
24  
25

**CERTIFICATE OF OFFICIAL REPORTER**

I, Robert W. Paschal, Registered Merit Reporter and Certified Realtime Reporter, in and for the United States District Court for the District of Massachusetts, do hereby certify that pursuant to Section 753, Title 28, United States Code, the foregoing pages are a true and correct transcript of the stenographically reported proceedings held in the above-entitled matter and that the transcript page format is in conformance with the regulations of the Judicial Conference of the United States.

Dated this 13th day of January, 2021.

/s/ Robert W. Paschal

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ROBERT W. PASCHAL, RMR, CRR  
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